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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: WAC 02 194 51834 Office: CALIFORNIA SERVICE CENTER Date: DEC 29 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a custom auto and boat upholstery firm. It seeks to employ the beneficiary permanently in the United States as a custom upholsterer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel asserts that the director erred in evaluating the petitioner's tax returns and that the evidence supports the petitioner's ability to pay the proffered salary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 3, 1998. The proffered wage as stated on the Form ETA 750 is $12.63 per hour, which amounts to $26,270.40 per annum. On Part B of the ETA 750, signed by the beneficiary on November 2, 1998, the beneficiary does not claim that he has worked for the petitioner.

On Part 5 of the preference petition, the petitioner claims that it was established in 1982, has a gross annual income of $1,027,139, a net annual income of $117,911, and currently employs ten workers.

The petitioner is structured as a sole proprietorship. In support of its ability to pay the proffered wage, the petitioner initially submitted copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 1998, 1999, and 2000. The tax returns reflect the sole proprietor filed jointly with his spouse in 1998 and 1999, claiming three dependents in 1998 and four dependents in 1999. The sole proprietor filed as a single person in 2000 and claimed one dependent in 2000. The tax returns also contain the following information for the following years:

	1998	1999	2000
Proprietor's adjusted gross income (Form 1040)	$ 41,757	$ 62,307	-$ 4,092
Petitioner's gross receipts or sales (Schedule C)	$662,616	$851,024	$ 670,021
Other business gross receipts or sales (Schedule C)	$ 7,701	$ 33,925	$1,027,139
Petitioner's wages paid (Schedule C-1)	$140,397	$178,898	$ 164,932
Petitioner's net business income (Form 1040)	$ 44,405	$ 69,567	-$ 4,148

As set forth above and within the sole proprietor's tax returns, the petitioner's financial data is presented on one Schedule C, Profit or Loss From Business, and the sole proprietor's other business activity is reported on a second Schedule C. It is only identified as "automotive."

On October 15, 2002, the director requested additional evidence pertinent to the petitioner's ability to pay the beneficiary's proposed wage offer. The director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner to provide this evidence from 2001 to the present. He also instructed the petitioner to provide its federal income tax returns for 2001 and 2002, including all schedules and tables.

In response, the petitioner, through counsel, submitted a copy of the sole proprietor's 2001 tax return. Counsel noted that the 2002 tax return was not yet available as the calendar year had not ended. The sole proprietor's individual tax return for 2001 reflected that he filed as single person and claimed one dependent. He reported adjusted gross income of $36,739, including net business income of $43,802. On the petitioner's Schedule C, Profit or Loss From Business, he reported gross receipts or sales of $475,062, including wages of $185,168, and a net business profit of -$88,970. On the sole proprietor's other Schedule C, he reported gross receipts or sales of $3,118,829, including no wages paid and a net business profit of $132,772.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 7, 2003, denied the petition.

On appeal, counsel submitted partial copies of the sole proprietor's 1998 through 2001 tax returns and asserts that the totals claimed for depreciation and outside contractors, as well as for temporary and part-time workers established that the petitioner had available funds to pay the proffered wage. Counsel also claims that by hiring a skilled worker, the sole proprietor would increase gross and net profits for the petitioning business.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it has previously employed the beneficiary.

Counsel's suggestion that the sole proprietor's reported depreciation figures for each of the relevant years should be somehow considered apart from the sole proprietor's adjusted gross income in order to support the

petitioner's ability to pay the proffered wage is not persuasive. No authority is cited for this proposition. In determining the petitioner's ability to pay the proffered wage, the CIS will generally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman,* 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983). It is also noted that depreciation as the decreased value of the assets of a business is considered to be a relevant factor in determining the financial viability of the business and will not be added back to a petitioner's net income. *Chi-Feng Chang v. Thornburgh,* 719 F. Supp. at 537.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group,* 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983).

In *Ubeda,* 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, although the sole proprietor and his spouse claimed one less dependent in 1998 than the *Ubeda* petitioner, the proffered wage represents 63% of the sole proprietor's adjusted gross income that year. In 1999, the proffered wage represents 42% of the sole proprietor's adjusted gross income. In 2000, the proposed wage offer exceeded the adjusted gross income by $30,362.40, and in 2001, the certified wage represents 72% of the reported adjusted gross income. Even though the director failed to request a summary of the sole proprietor's monthly living expenses during the relevant period, the AAO concludes from the evidence that, with the possible exception of 1999, it would be improbable that the sole proprietor could support himself and his family on what would remain for an entire year after reducing the adjusted gross income by the amount required to pay the proffered wage in 1998, 2000, and 2001.

Finally, counsel argues that the monies expended for outside labor and for part-time and temporary workers would have been available to pay the beneficiary's proposed salary. While the record indicates that the sole proprietor declared $22,973 as "sub-contracts" in 1998, $91,509 as "sub-contracts" in 1999, $82,660 paid as "outside services" in 2000, and $36,544 paid to "sub-contractors" in 2001, there is no first-hand evidence that the allocation went to a contract laborer performing the proposed position of custom upholsterer as described

on the approved labor certification. Further, the record does not identify these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner replaced them with the beneficiary. It is noted that wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary as of the priority date of the petition and continuing to the present. An unsupported statement cannot meet the burden of proof in this proceeding. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel also argues that the beneficiary will contribute to an increase in business for the petitioner. It is noted that the record contains no evidence of this projected increase in profits or any information from which this asserted increase in business might be estimated. The prospective increase in profits hypothesized by counsel is not supported by evidence in the record and cannot be considered in this case. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Accordingly, based on the evidence contained in the record and after consideration of the information and arguments presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.